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In the Supreme Court of the United States

OCTOBER TERM, 1968.

No. 327.

WILLIAM J. JACOBS,

Petitioner,

v.

THE TOLEDO BAR ASSOCIATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO.

BRIEF OF RESPONDENT IN OPPOSITION.

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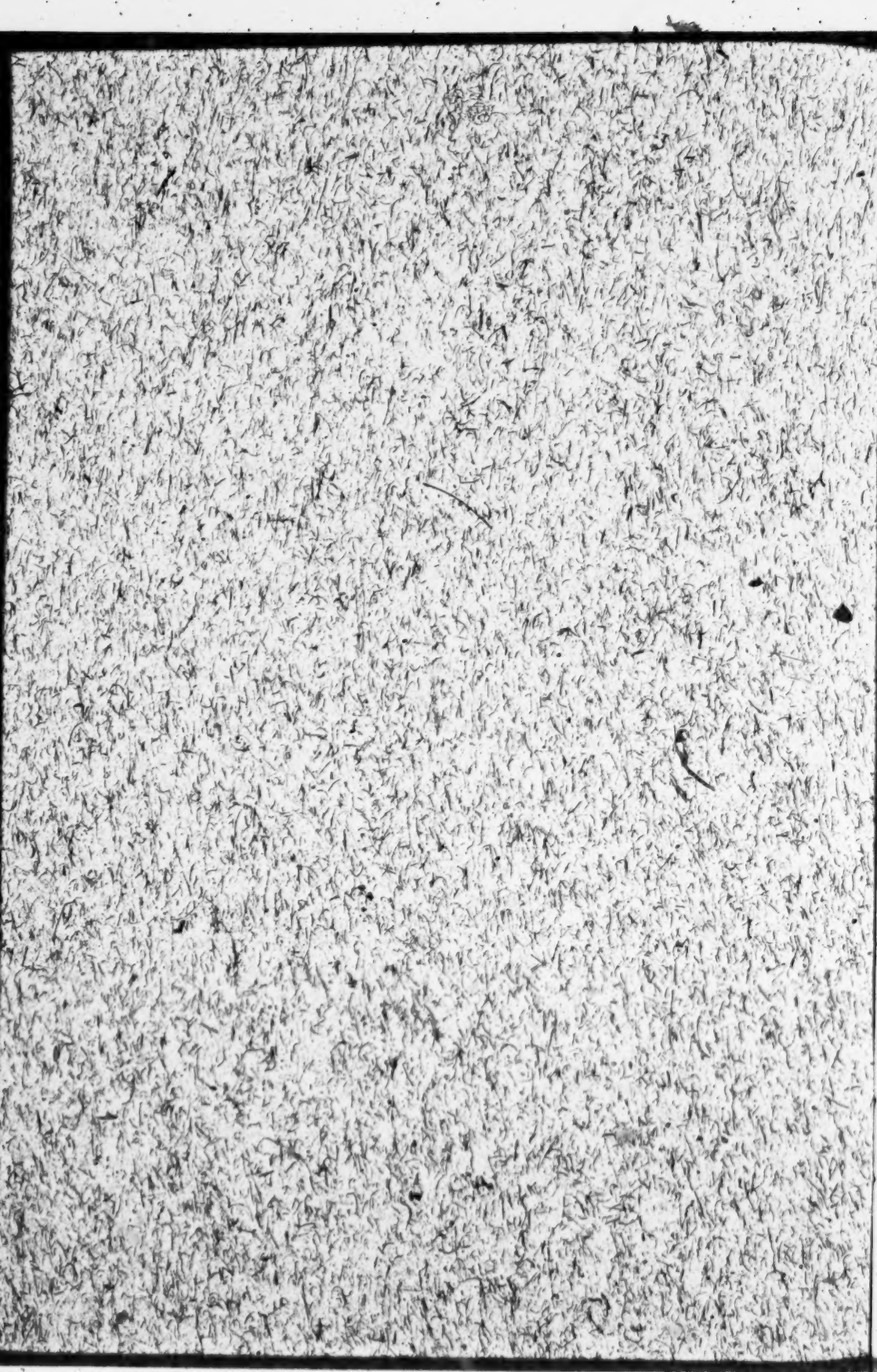


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Respondent The Toledo Bar Association opposes the petition filed herein for a writ of certiorari and prays that such petition be denied.

QUESTIONS PRESENTED.

The questions presented for review, as stated by petitioner, are not accurately "expressed in the terms and circumstances of the case" (see paragraph 1 (c) of Rule 23). The inaccuracies are noted *infra* in respondent's statement of the case.

STATEMENT OF THE CASE.

Respondent sets forth here certain facts material to the consideration of the petition for writ of certiorari which were not included in petitioner's statement or which were inaccurately presented therein.

In the answer signed by petitioner and filed in response to the complaint filed by respondent with the Board

of Commissioners on Grievances and Discipline, petitioner admitted that he received the sum of $11,500.00 in trust while he was acting as attorney for the receiver, and "that he deposited said sum in a savings account number 6249 of Toledo Home Federal Savings Association and permitted said account to be used as collateral security for a passbook loan for another client, but subject to immediate recall and payment." (A. p. 8, *infra.*) Petitioner also freely admitted such use of the receivership funds in his oral testimony before the Board.

The hearing before the panel of the Board of Commissioners was held, as stated by petitioner, on October 12, 1966, but Robert J. Devine was not under indictment at that time. The copy of the indictment filed by petitioner with the Supreme Court of Ohio shows on its face that it was returned by the Grand Jury of Lucas County, Ohio, during the January term, 1967, for a wholly unrelated matter, and filed with the Clerk of the Court of Common Pleas of Lucas County on March 22, 1967.

It is true that the bank statements and checks relating to petitioner's "trust account" were physically submitted to the Board of Commissioners after the conclusion of the oral hearing before the panel, but they were submitted by *both* parties (actually dispatched to the Board by petitioner) pursuant to a stipulation entered into by both parties *during* the hearing and *before* any decision was made by the board. (See excerpts from record before the panel, *infra,* A. pp. 9-11.) Moreover, both parties had the exhibits in hand during the preparation of their respective briefs to the Board of Commissioners for such comment therein as either party deemed advisable.

The supposition expressed by petitioner at page five of his petition—that the "finding of the state court that 'it appears that respondent [William J. Jacobs] deposited the

receivership funds in the trustee account he used for all his clients' apparently is based on the checks and bank statements"—is unfounded under the state of the record, for at the hearing before the panel petitioner orally testified that he deposited the receivership funds in his trustee account which he used for all his clients. (See excerpts from record before the panel, *infra*, A. pp. 9-11.)

REASONS FOR NOT GRANTING THE WRIT.

The petitioner states that he seeks a writ of certiorari under Rule 19, which authorizes a review "where a state court has decided a federal question of substance not theretofore determined by this court, or had decided it in a way probably not in accord with applicable decisions of this court." (Petition, pp. 1-2.)

Neither of these grounds is available to petitioner in the case at hand. The state court has not decided in this case a federal question of substance not heretofore determined by this Court. (See its opinion and orders set forth in Petitioner's Appendix A, B and C, pp. 11-16.) This Court has already decided the right of an attorney to the due process of law in disciplinary proceedings. See *Spevack v. Klein*, 385 U.S. 511, 87 S. Ct. 625 (1967), and *In re Ruffalo*, 390 U.S. 544, 88 S. Ct. 1222 (1968), cited by petitioner. See also *Bradley v. Fisher*, 13 Wall. 335 (1872). Cf. *Schware v. Board of Bar Examiners of State of New Mexico*, 353 U.S. 232, 77 S. Ct. 752 (1957), also cited by petitioner.

It is respondent's earnest contention that due process of law was accorded to petitioner and that this case was not decided by the state court contrary to any applicable decisions of this Court.

Petitioner had a full and fair hearing before the panel of the Board of Commissioners. He freely admitted his use

of the receivership funds for purposes other than those of the receivership; and this was the charge originally lodged against him by respondent.

The checks and bank statements he claims he had no opportunity to explain were *jointly* submitted to the Board of Commissioners by *both* petitioner and respondent pursuant to a stipulation made *before* the hearing was concluded by the panel. Unlike *In re Ruffalo,* 390 U.S. 544 (1968) no new charge was being made against petitioner during the hearing; the original charge of the misuse of trust funds was the subject matter of the complaint before the panel. Moreover, *petitioner made no objection to the submission of the bank documents to the board;* indeed, he stipulated to their submission.

After the hearing, respondent was obligated to submit a brief to the panel, then petitioner was obligated to respond thereto. Both parties, therefore, had the opportunity to comment upon the evidence, including the bank documents, if they so chose. Full opportunity was accorded petitioner to refuse to stipulate to the submission of the documents, or to object to their submission, or to comment upon them.

Petitioner also complains that he had no opportunity to present the testimony of his associate, Robert Devine. The affidavit of Robert Devine submitted by petitioner to the state court (see petitioner's Appendix D, pp. 22-24) marks him as a perjurer; but this fact is of less significance than the facts that Devine was cross-examined by petitioner at the hearing before the panel and that Devine's testimony did not materially contradict the testimony of petitioner himself. Devine testified to his own involvement in the handling of the receivership funds; in no way did his testimony affect petitioner's involvement and admitted handling of the funds.

It should also be noted that Devine's fear of an indictment and suspension from the practice of law (both of which subsequently came to pass) was not related in any way to his participation as the receiver in the matter at hand. On the contrary, the indictment pertained to another, wholly unrelated transaction, and the suspension from the practice of law was based on still another wholly unrelated transaction.

Petitioner also complains that he was deprived of a full and fair hearing because the Board of Commissioners found that he had violated Canon 6 in representing clients with conflicting interests even though respondent made no such charge. It is acknowledged by petitioner that the Supreme Court of Ohio expressly stated in its opinion that it did not consider this finding of the Board in reaching its decision (Petition, p. 9).

Petitioner then proceeds to impugn the integrity of the state court without any basis therefor in the record, while at the same time professing not to question "the bona fides of the state court" (Petition, p. 9). The analogy petitioner seeks to draw between this case and *Griffin v. California,* 380 U.S. 609, 85 S. Ct. 1229 (1965), is quite faulty. One of a court's functions is to determine what is material or not material in reaching a decision. The *Griffin* case does not purport to interfere with this judicial function.

As was stated by the Supreme Court of Ohio in its decision of July 10, 1968, in *State v. White,* 15 Ohio St. 2d 146, ___ N.E. 2d ___:

> "* * * We indulge in the usual presumption that in a bench trial in a criminal case the court considered only the relevant, material, and competent evidence in arriving at its judgment unless it affirmatively appears to the contrary. *People v. Smith,* 55 Ill. App. 2d 480, 204 N.E. 2d 577."

The last question presented by petitioner is that the penalty of indefinite suspension from the practice of law is harsh and unreasonable. Once misconduct has been found, the discipline to be imposed is a matter of judicial discretion. It is true that this discretion must be exercised within lawful limits, but there is no suggestion in the record that the state court unlawfully exercised its discretion in this case.

The rules of the Supreme Court of Ohio clearly set forth the procedures by which an attorney indefinitely suspended from the practice of law may seek reinstatement. Petitioner makes no claim that these procedures are unreasonable, and the suggestion by petitioner that no attorney indefinitely suspended has been reinstated in Ohio does not necessarily give rise to the inference that the procedures for reinstatement are unreasonable. It is equally inferable that those who may have sought reinstatement failed for one reason or another to establish their right to be reinstated.

The misuse of trust funds by an attorney is one of the most serious charges that can be lodged against him. The protection of the public and of funds left in the care of an attorney demands the most rigid adherence to the standards of proper conduct. An attorney does not furnish any bond to his clients to secure his faithful discharge of his duties with respect to trust funds. His only bond is his word. In such light it cannot seriously be urged that the misuse of trust funds by an attorney does not call for the judgment which the state court rendered in this case.

CONCLUSION.

It is earnestly maintained that petitioner has failed to show any grounds for the granting of a writ of certiorari and that his application therefor should be denied.

Respectfully submitted,

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and

JAMILLE G. JAMRA,
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Attorneys for Respondent.

APPENDIX.

ANSWER OF WILLIAM JAMES JACOBS.

No. 110.

BEFORE THE BOARD OF COMMISSIONERS ON GRIEVANCES AND DISCIPLINE OF THE SUPREME COURT OF OHIO

In re: Complaint against WILLIAM J. JACOBS, *Respondent.*

THE TOLEDO BAR ASSOCIATION, *Relator.*

ANSWER.

Now comes respondent, William J. Jacobs, admits that while acting as attorney for Robert J. Devine, the receiver appointed by the Court of Common Pleas of Lucas County, Ohio, in cause number 194109, he did receive said sum of Eleven Thousand Five Hundred Dollars ($11,500.00) in trust; that he deposited said sum in a savings account number 6249 of Toledo Home Federal Savings Association and permitted said account to be used as collateral security for a passbook loan for another client, but subject to immediate recall and payment.

Respondent denies that said conduct constituted a willful violation of his oath of office or of the Canons of Ethics; respondent further states that a full and complete accounting was approved by the court on cause number 194109 without loss to any of the parties involved.

WILLIAM J. JACOBS,
CUBBON AND RICE,
By DAVID R. GOLDBERG,
Attorneys for Respondent.

(Certificate of Service Omitted.)

EXCERPTS FROM TRANSCRIPT OF HEARING BEFORE PANEL OF THE BOARD OF COMMISSIONERS ON GRIEVANCES AND DISCIPLINE OF THE SUPREME COURT OF OHIO.

October 12, 1966.

Testimony of Mr. William Jacobs upon cross-examination, page 44 of transcript:

"Mr. Jamra:

Q. What did you do with that $500.00 withdrawal?

Mr. Jacobs:

A. I put it in my trustee account where I had been paying the bills, that was owing me from the receivership.

Q. When you were making withdrawals from the first, was your trustee account constituted solely of funds left on deposit with you by clients?

A. Yes."

Stipulation regarding bank records, pages 221-226 of transcript:

[Frank W. Cubbon, Jr., Esq., whose name appears in the following excerpt, appeared as counsel for Mr. Jacobs before the hearing panel, and Rankin M. Gibson, Esq., who appears as counsel for petitioner in this court, joined Mr. Cubbon as counsel for Mr. Jacobs in all proceedings before the Supreme Court of Ohio. Mr. Summers, whose name also appears below, was a member of the hearing panel.]

"Chairman Dreidame: It is understood and agreed however, that counsel for the Respondent and counsel for the relator will procure from the Lucas County State Bank records of Mr. Jacobs' trust account for the months of December, 1963, through May of 1964, consisting of

the bank reconciliation statements by month, the copies of any deposit slips, and copies of cancelled checks.

Mr. Summers: May I have the further suggestion that the month of July be included in that, or unless there is some objection.

Chairman Dreidame: All right, then, amend it to include July, 1964, and that those photostatic copies may be delivered to the court reporter here, marked as Exhibit 11, and filed with these papers when the transcript is filed in the Supreme Court.

Any objection to that procedure for handling that particular point?

Mr. Cubbon: * * *

Chairman Dreidame: We will get you that information. But, does that handling of the stipulated Exhibit 11 satisfy and consistent with what is understood by counsel?

Mr. Cubbon: That is agreeable.

Mr. Jamra: Agreeable with the Relator.

Mr. Ide: Yes, agreeable.

Mr. Summers: Exhibit 11 then will be the bank records?

* * * * *

Chairman Dreidame: Then may the record show that *leave is given in the discretion and judgment of counsel for the respondent if he is able to procure and desires to procure and file photostatic copies of the bank reconciliation statement which was received by Mr. Jacobs from the Lucas County State Bank on his trust account for the month of June, 1964, and a photostatic copy of deposit slips, if available, and a photostatic copy of cancelled checks;* leave is given to do so within the next two weeks, and if so filed will be shown as Exhibit 12, and the fact of filing would be communicated to counsel

for the Relator so that they would have an opportunity to examine same before any filing of the document with the Supreme Court.*

Now, is there anything that counsel for either the Relator or the Respondent wanted to add to that statement into the record, either by way of modification or correction?

Mr. Jamra: Do I understand that counsel for the Relator will have an opportunity to examine both Exhibits 11 and 12 before they are submitted to the Supreme Court?

Chairman Dreidame: Yes, I understood that Exhibit 11 was going to be more or less jointly obtained by the effort, but I think the record should show that an opportunity is hereby given to counsel for the Relators to examine Exhibits 11 and 12 and to make any copies thereof that they want before the records are sent to Columbus.

Mr. Summers: I am not sure as related to the bank accounts, you mentioned the ledger sheets?

Chairman Dreidame: That is the bank reconciliation statements each month.

Mr. Cubbon: The balance sheet.

Chairman Dreidame: Which shows the charges and the credits.

Now, is there anything further by way of stipulation or by way of testimony that either side desires at this time to offer, proposes to offer in this record, or are we at a point where we may consider, subject to Exhibits 11 and 12 coming in, if they do, that we may consider that the evidence has been presented into the record. Is that correct counsel for the Relator?

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* The items which would have constituted Exhibit 12 were in fact included in Exhibit 11.

Mr. Jamra: Yes.
Mr. Ide: Yes.
Chairman Dreidame: Correct, Mr. Cubbon?
Mr. Cubbon: Yes, sir." [Emphasis supplied.]

* * * * *